COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	D.T.E. 01-31-Phase I

August 20, 2001

HEARING OFFICER RULING ON MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR LEAVE TO SEEK RECONSIDERATION OR CLARIFICATION OF THE SCHEDULE OF THIS PROCEEDING AT THE TIME THAT AT&T FILES ITS TESTIMONY ON AUGUST 24, 2001

I. INTRODUCTION

On June 21, 2001, the Department of Telecommunications and Energy ("Department") issued its Interlocutory Order on Scope, D.T.E. 01-31 (2001) ("Scope Order"). In its Scope Order, the Department determined that this proceeding would be divided into two phases, the first of which would comprise an investigation into the levels of competition and the necessary Department findings regarding competition sufficient to permit Verizon's requested pricing flexibility. Scope Order at 17. The Department determined that at the start of the second phase, the Department would determine whether the additional categories that intervenors argued should be included in the scope of this proceeding (including the issue of intrastate access reform) will be part of the second phase. Id. at 18. On July 9, 2001, at the procedural conference to establish the schedule for the first phase, the Department established August 24, 2001, as the deadline for intervenors to pre-file direct testimony on the issues to be decided in the first phase. At the procedural conference, AT&T Communications of New England, Inc. ("AT&T") reiterated its proposal that the issue of intrastate access reform be expeditiously investigated on a separate but parallel track running concurrently with the adjudication of the issue of competition (Tr. at 68). The hearing officer requested that AT&T submit its proposal in the form of a written motion, which the Department would consider to be akin to a motion for reconsideration of the Department's Scope Order (id.).

On August 10, 2001, AT&T filed with the Department a Motion for Leave to Seek Reconsideration or Clarification of the Schedule of This Proceeding at the Time That AT&T Files Its Testimony on August 24, 2001 ("Motion for Leave"). Pursuant to a schedule established by the hearing officer, on August 17, 2001, Verizon Massachusetts ("Verizon")

filed comments in response to AT&T's Motion for Leave ("VZ Comments"). No other party filed a response to AT&T's Motion for Leave.[1]

II. POSITIONS OF THE PARTIES

A. AT&T

In its Motion for Leave, AT&T asks that it be permitted to file a motion for reconsideration or clarification of the Department's Scope Order concurrent with the filing of its direct testimony on August 24, 2001 (Motion for Leave at 3). AT&T states that because the Department ordered Verizon to include a plan for intrastate access reform in its Vote and Order Opening Investigation, D.T.E. 01-31, at 2 (February 27, 2001), the issue of access reform is not an issue of scope in this proceeding, but rather one of scheduling (id. at 2). AT&T suggests that the economic theory supporting the notion that access charge reform should proceed expeditiously is related to the economic theory that provides guidance regarding the type of competition necessary to justify pricing flexibility (id. at 2-3). AT&T contends that its testimony regarding the showing of competition that Verizon must make in Phase I to justify pricing flexibility must necessarily touch upon the issue of access reform (id. at 3). AT&T argues that the Department will be able to make a better decision of when to schedule its investigation of access reform when it receives AT&T's testimony, and, therefore, AT&T seeks leave to file its motion for reconsideration or clarification of the Scope Order at the time it files its direct testimony (id.).

B. Verizon

In its comments, Verizon argues that AT&T's Motion for Leave should be denied (VZ Comments at 1). Verizon argues that the Motion for Leave is not only untimely, but mischaracterizes the Department's Scope Order (id. at 1-2). In the Scope Order, argues Verizon, the Department indicated that it would consider whether or not to address access reform as part of this proceeding at the start of the second phase, but did not state that the issue would definitively be part of this proceeding (id. at 2). Verizon further argues that if the Department decides to include access reform in this proceeding, the proper time for AT&T and others to submit testimony on the issue is after the first phase has been concluded (id.).

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[1] Network Plus and Allegiance submitted a two sentence email response, however, unless special arrangements are made in advance with the hearing officer, email responses can not be considered "filings" under our procedural rules.

III. ANALYSIS AND FINDINGS

AT&T has not submitted a motion for reconsideration or clarification of the Department's Scope Order, but seeks leave from the Department to do so. Without a motion for reconsideration or clarification before it, the Department can not comment on the merits of such a proposal. What I will rule on in response to AT&T's Motion for Leave are the procedural implications in filing a motion for reconsideration or clarification at this stage of our proceeding. For the reasons discussed below, AT&T's Motion for Leave is denied.

Leave is required when a party seeks to take some action which, without such permission, would not be allowable. See Black's Law Dictionary 801 (5th ed. 1979). In its Motion for Leave, AT&T does not identify why the motion for reconsideration or clarification it seeks to file with its direct testimony on August 24, 2001, would not be allowed without leave. However, AT&T is correct in anticipating that a motion for reconsideration or clarification of the Scope Order filed at this stage of the proceeding, would face significant procedural obstacles.

Pursuant to 220 C.M.R. § 1.11(10), a party may file a motion for reconsideration within twenty days of service of a final Department Order. The Department has repeatedly held that 220 C.M.R. § 1.11(10) limits reconsideration to final Department Orders, not interlocutory Orders. Cablevision of Boston Co., D.P.U./D.T.E. 97-82, at 6, Interlocutory Order on Complainant's Motion for Reconsideration and Clarification of Department's Order on Scope of Proceeding (March 5, 1998); Cambridge Electric Company, D.P.U./D.T.E. 97-111, at 8 (February 27, 1998); Boston Edison Company, D.P.U. 97-63, at 8, Interlocutor's Order on Motion to Vacate and Reconsider (October 10, 1997); Boston Edison Company, D.P.U. 96-23-A at 7 (1997); Price Cap Plan, D.P.U. 94-50, at 3 n.3, Interlocutory Order on Motions for Clarification of NYNEX, NECTA, Attorney General and AT&T (July 14, 1994). The limitation of reconsideration to final Orders and not interlocutory Orders, is based on the principle of administrative efficiency. The Department's ability to make final determinations on issues and carry out its regulatory duties would be seriously hampered if it were required to reconsider every preliminary, procedural and interlocutory decision. This principle is also recognized in the Massachusetts Administrative Procedure Act ("MAPA"), G.L. c. 30A. Under the MAPA, administrative agency rulings which are procedural or interlocutory in nature are not immediately reviewable. Only after a final decision has been entered in the adjudicatory proceeding by the administrative agency would such rulings be reviewable pursuant to G.L. 30A, § 14.[2] Cella, Administrative Law and Practice, Massachusetts Practice Series, Vol. 40, § 1756. Further, under G.L. c. 25, § 5, appeals are only permitted from final decisions or Orders of the Department. See also Boston Gas Company v. Department of

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[2] Pursuant to G.L. c. 30A, § 14, any person aggrieved by a final decision of an agency in an adjudicatory proceeding is entitled to judicial review of that decision.

Public Utilities, 368 Mass. 780 (1975). Thus, the Department has repeatedly denied motions for reconsideration of interlocutory Orders on a strictly procedural basis. Cablevision of Boston Co., D.P.U./D.T.E. 97-82, at 6, Interlocutory Order on Complainant's Motion for Reconsideration and Clarification of Department's Order on Scope of Proceeding (March 5, 1998); Cambridge Electric Company, D.P.U./D.T.E. 97-111, at 8 (February 27, 1998); Boston Edison Company, D.P.U. 97-63, at 8, Interlocutor's Order on Motion to Vacate and Reconsider (October 10, 1997); Boston Edison Company, D.P.U. 96-23-A at 7 (1997). As the Scope Order in this proceeding is an interlocutory Order and not a final Order, the Department could deny a motion by AT&T for reconsideration of the Scope Order on that ground alone without reaching the merits of AT&T's motion for reconsideration.[3]

With regard to a motion by AT&T for clarification of the Department's Scope Order, this action raises concerns of its own. Clarification of previously issued Orders may be granted where an Order is silent as to the disposition of a specific issue requiring determination in the Order, or where the Order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/182978, at 2 (1976). As the Scope Order was not silent as the issue of when the Department would address the possibility of considering intrastate access reform as part of this proceeding, I question AT&T's ability to show in a motion for clarification that the Scope Order was sufficiently ambiguous on that issue as to require clarification.

What AT&T seems to seek in its Motion for Leave then, is permission to file a motion for reconsideration or clarification of the Scope Order despite the procedural infirmities discussed above. Granting of such leave would be a considerable departure from both our procedural rules and past precedent, and would require, at a minimum, a strong showing by the moving party that such a departure is not merely reasonable, but necessary for the orderly administration of our proceeding.[4] AT&T argues in its Motion for Leave that its testimony

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[3] As the parties are by no doubt aware, even if the Department were to reach the merits of a motion by AT&T for reconsideration of the Scope Order, the standard of review for motions for reconsideration is very rigorous. AT&T would be required to show that previously unknown or undisclosed facts have come to light that would have a significant impact on the decision already rendered. AT&T could not attempt to reargue issues previously considered and decided. See Commonwealth Electric Company, D.P.U. 92-3C-1A at 306 (1995); Boston Edison Company, D.P.U. 1350-A at 4 (1983).

[4] Under 220 C.M.R. § 1.01(4), "where good cause appears, not contrary to statute, the Commission and any presiding officer may permit deviation from 220 C.M.R. 1.00."

regarding the showing of competition that Verizon must make in Phase I to justify pricing flexibility must necessarily touch upon the issue of access reform (Motion for Leave at 3). Further, AT&T argues that the Department will be able to make a better decision of when to schedule its investigation of access reform when it receives AT&T's testimony (id.). I find that the reasons AT&T has proffered in support of its Motion for Leave do not justify deviation from our procedural rules and past precedent to grant AT&T leave to file a motion for reconsideration or clarification of the Scope Order at this stage of the proceeding.

I further find that additional grounds for denying AT&T's Motion for Leave concern the delay between the issuance of the Scope Order and AT&T's filing of its Motion for Leave. The Scope Order was issued on June 21, 2001; AT&T's Motion for Leave was filed on August 10, 2001. If AT&T's Motion for Leave were granted, AT&T would not file its motion for reconsideration or clarification of the Scope Order until August 24, 2001, more than two months after the issuance of the Scope Order. Permitting a two-month interval between issuance of a Department Order and the filing of a motion for reconsideration or clarification of that Order would require extraordinary circumstances. For illustration, under 220 C.M.R. § 1.11(10), a motion for reconsideration of a final Order must be filed within twenty days. Pursuant to 220 C.M.R. § 1.02(5), the Department may grant an extension of any time limit prescribed in our procedural rules, but requires that such requests be made by motion before the expiration of the period originally prescribed and that the party seeking an extension must show good cause for the request. I find that neither has AT&T filed its Motion for Leave within a reasonable time following the issuance of the Order it intends to have the Department reconsider, nor has AT&T addressed in its Motion for Leave why permitting a two-month interval between issuance of the Scope Order and the filing of a motion by AT&T for reconsideration or clarification of that Order would not seriously undermine the certainty and predictability critical to an orderly proceeding.

IV. RULING

AT&T's Motion for Leave is denied.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: August 20, 2001

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Paula Foley, Hearing Officer